

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4  
5 FLASHPOINT TECHNOLOGY, INC., ) Civil Action  
6 Plaintiff, )  
7 v. )  
8 AIPTEK, INC., et al., ) No. 08-139-GMS  
9 Defendants. ) (and other  
related cases)

10 - - -

11 Wilmington, Delaware  
12 Friday November 20, 2009  
2:45 p.m.  
Telephone Conference  
13 - - -

14 BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge

15 APPEARANCES:

16 JAMES MERKINS, ESQ.  
Bouchard Margules & Friedlander, P.A.  
-and-  
17 JOSEPH BENZ, ESQ.  
MICHAEL J. DOWD, ESQ.  
Coughlin Stoia Geller Rudman Robbins LLP  
18 (San Diego, CA)  
-and-  
19 JOHN F. WARD, ESQ.  
Ward & Olivo  
20 (New York, N.Y.)

21 Counsel for Plaintiff

22 RUSSELL E. LEVINE, P.C., ESQ.  
23 Kirkland & Ellis  
24 (Chicago, IL)

25 Counsel for Defendant Motorola

1 APPEARANCES CONTINUED:

2 KAREN KELLER, ESQ.  
3 Young Conaway Stargatt & Taylor LLP

4 -and-

5 DAVID C. DOYLE, ESQ.  
6 Morrison & Foerster LLP  
7 (San Diego, CA)

8 Counsel for Defendant Kyocera

9 JOHN G. DAY, ESQ.  
10 Ashby & Geddes

11 Counsel for CellCo,  
12 AT&T Mobility, T-Mobile and  
13 Sprint

14 PETER J. CHASSMAN, ESQ.  
15 Howrey LLP  
16 (Houston, TX)

17 Counsel for RIM Corp., Ltd.

18 JAMES P. BRADLEY, ESQ.  
19 Sidley & Austin LLP  
20 (Dallas, TX)

21 Counsel for LG Defendants

22 HUAN-YI LIN, ESQ., and  
23 DREW DIAMOND, ESQ.  
24 Hogan & Hartson  
25 (Los Angeles, CA)

Counsel for HTC and Aiptex

(Others on call not identified.)

1 THE COURT: Good afternoon.

2 (Counsel respond "Good afternoon.")

3 THE COURT: Counsel, what I would like to do is  
4 ask only those who are going to participate in this  
5 conversation to identify themselves, beginning with the  
6  
7 plaintiff.

8 MR. MERKINS: Your Honor, this is James Merkins  
9 for FlashPoint at Bouchard Margules & Friedlander. On the  
10 line with me that will be participating is Mike Dowd from  
11 Coughlin Stoia.

12 THE COURT: Thank you. Good afternoon.

13 MR. MERKINS: Your Honor, just to address that,  
14 I believe, also, the parties that will be speaking for the  
15 plaintiffs this morning other than from Coughlin Stoia will  
16 be Joe Benz, and John Ward from Ward & Olivo, possibly John  
17 Rice from my firm as well.

18 THE COURT: This may be a more difficult  
19 assignment for the defendants. Are you able to offer me one  
20 or two representative voices?

21 MR. DAY: I think so, Your Honor. This is John  
22 Day from Ashby & Geddes. I am Delaware counsel for CellCo  
23 Partnership and AT&T Mobility. I will be speaking on behalf  
24 of the four cell phone carrier defendants in the case. In  
25 addition to CellCo and AT&T Mobility, I will be speaking on

1       behalf of T-Mobile and Sprint.

2               MR. LEVINE: Your Honor, this is Russell Levine.

3       I will be speaking on behalf of Motorola.

4               MR. BRADLEY: Your Honor, this is Jim Bradley  
5       with Sidley Austin. I will be speaking on behalf of the LG  
6       entities.

7               MR. CHASSMAN: Your Honor, Pete Chassman on  
8       behalf of Research in Motion.

9               MS. KELLER: Karen Keller from Young Conaway  
10       Stargatt & Taylor. With me on the line is David Doyle from  
11       Morrison & Foerster on behalf of Kyocera.

12              THE COURT: Anyone else?

13              MR. LIN: Your Honor, this is Huan-Yi Lin and  
14       Drew Diamond from Hogan & Hartson who will speak for HTC and  
15       Aiptex.

16              THE COURT: Okay. Next?

17              Have we come to the end? All right.

18              So, counsel, I gather that we are here basically  
19       to discuss whether it's appropriate for me to endorse the  
20       stay that has been proposed by the plaintiff and at least  
21       some of the defendants in the manner that has been proposed  
22       by the plaintiff in its amended proposed form of order. Is  
23       that a fair assessment of the issue from the plaintiff's  
24       perspective?

25              MR. Benz: Your Honor, I believe that is a fair

1 assessment, with the caveat that, obviously, there are at  
2 least -- well, there are three competing proposed orders out  
3 there: one presented by the plaintiff, one filed with the  
4 original motion, and one filed last night by I believe  
5 Motorola.

6 So the ultimate issue at some point is the stay  
7 pending reexamination. The issue that we presented to you  
8 in the joint letter yesterday was simply, if you are not  
9 prepared to take up that issue at this point, whether the  
10 deadlines that occur between now and when you are going to  
11 take up that issue should be stayed pending your decision on  
12 the ultimate motion to stay.

13 THE COURT: Did you say a joint letter of  
14 yesterday?

15 MR. Benz: Yes, Your Honor. We filed the joint  
16 argumentative letter of yesterday at noon.

17 THE COURT: Could you give me just a moment.  
18 Unfortunately, I hadn't seen this. Let me just take a quick  
19 look at it, please.

20 (Pause.)

21 THE COURT: That is fine. I appreciate the  
22 proposal as far as it goes. I think that, if I can, I would  
23 just as soon take up the issue of whether there should be a  
24 stay pending the reexam period. Anybody have a difficulty  
25 with that?

1 MR. Benz: Plaintiff does not, Your Honor.

2 MR. DOYLE: Your Honor, Kyocera, who has brought  
3 the motion, does not.

4 THE COURT: Anybody who does, does anybody  
5 disagree that we should take this up now?

6 All right. The silence is deafening. We will  
7 take it up. Let's hear more about this from plaintiff's  
8 perspective.

9 MR. Benz: Your Honor, the motion was filed by a  
10 number of the defendants, if you count multiple versions of  
11 the same entity, ten out of the 40 defendants, to stay the  
12 case pending reexam. Reexam requests were filed for all ten  
13 of the patents in suit. At this point six of those  
14 reexamination requests have been accepted and granted by the  
15 PTO. Four have been accepted but not granted as of yet,  
16 although I think there is probably very little doubt, based  
17 from their statistics, that they will grant those requests  
18 for reexamination.

19 Plaintiff does not oppose staying the case  
20 pending the outcome of those reexamination requests.  
21 However, we felt that the way the original order was  
22 presented allowed for someone to come in six months from now  
23 and file another reexam and six months after that come in  
24 and file another reexam request.

25 We simply modified the original order, saying

1 that the case be stayed pending the reexaminations which are  
2 now on file, to prevent the serialization of reexam filing,  
3 which results in delayed resolution of the case almost  
4 indefinitely. Other than that small change to the proposed  
5 order, which counsel for Kyocera has joined us in agreeing  
6 to -- and they are one of the original movements for the  
7 stay on the first point -- we do not oppose a stay at this  
8 point.

9 THE COURT: Which of the defendants agrees with  
10 Kyocera and FlashPoint? Is it just Kyocera and FlashPoint  
11 that agree on the proposed order as revised by FlashPoint?

12 MR. LIN: Your Honor, Huan Yi-Lin from Hogan &  
13 Hartson for HTC.

14 Your Honor, HTC also cosigned the motion to  
15 stay. But we are opposed to the condition that the stay  
16 should be dependent on the current request.

17 THE COURT: I understand. Anyone else who joins  
18 in that position?

19 MR. LIN: Aiptek also supports a motion to stay.

20 THE COURT: Or defendants that agree with HTC  
21 and Aiptek?

22 Nobody does. Okay.

23 Let me hear from the principal movant, please.

24 MR. DOYLE: Your Honor, this is David Doyle.  
25 Also, thank you for hearing the matter on this expedited

1 basis.

2 Kyocera Wireless and Kyocera Communications  
3 brought the pending motion to stay due to the pendency of  
4 resolutions as to all of the ten patents asserted. To give  
5 the latest update on the status of those reexaminations,  
6 nine of the ten have been granted. There is only one still  
7 being considered by the Patent Office and we do expect a  
8 granting of that reconsideration request any day now.

9 We brought the motion to achieve the judicial  
10 litigation efficiency benefits provided by a stay under  
11 these circumstances, of which we know the Court is well  
12 aware. My understanding, although we haven't heard from the  
13 other people based on the call, but according to what has  
14 been on file, there are eight other defendants that joined  
15 the two Kyocera defendants in support of this motion.

16 Again, I know Your Honor is well aware in  
17 general of the efficiency benefits that can be achieved  
18 through a stay when a reexamination (inaudible). I wanted  
19 to emphasize that here we are not talking theory. As I said  
20 before, the reexamination has been granted on nine out of  
21 the ten. The reexamination of all the issued claims has  
22 been granted as to five patents.

23 So every claim on five of the patents is now  
24 under reexamination. And all of the independent claims of  
25 seven of the asserted patents are under reexamination.



1           And we just received this morning from the  
2           plaintiff the claims that are in fact being asserted by the  
3           plaintiff. And we have done a quick match of those against  
4           the reexamination request. By our consideration it appears  
5           that all of the claims being asserted by the plaintiff are  
6           included in the reexamination except one dependent claim  
7           asserted against one defendant, and that one defendant is a  
8           supporter of the stay.

9           So we definitely have a lot of the reasons and  
10          the efficiencies that reexamination can provide on our side.  
11          And a stay to await those benefits is present in this case.

12          Finally, my only final comment is there was a  
13          filing yesterday by three of the defendants saying that the  
14          stay should be postponed to allow discovery to get going.  
15          But my review of the case law has always indicated to me  
16          that courts generally consider it better, not worse, to  
17          enter the stay as early as possible in the case, and  
18          preferably before discovery starts.

19                 Thank you, Your Honor.

20                 THE COURT: Counsel, give me your name again.

21                 MR. DOYLE: David Doyle.

22                 THE COURT: Mr. Doyle, could you share with the  
23          Court -- apparently there is a difference between you and  
24          FlashPoint as to the extent of the stay. You heard, I think  
25          it was Mr. Benz, discuss his wish not to have serialization

1 of stays, I think that was the term, that is, successive  
2 requests for stays coming in on I guess additional claims, I  
3 would imagine. I am not sure exactly what is meant by that.

4 Could you comment on that?

5 MR. DOYLE: Your Honor, yes, be happy to.

6 We have joined the plaintiff in their proposed  
7 order on the following grounds: that what the plaintiff has  
8 requested is that once all the pending reexaminations are  
9 finally resolved by the Patent Office, there would be a  
10 status conference with the Court. And we support that.  
11 What would be the proper course for the case at that point I  
12 think would depend completely on what has happened in the  
13 Patent Office on the reexamination, what if any other  
14 reexamination requests have been filed in the interim, if  
15 any. And the situation at that point will need to be  
16 evaluated by the parties and the Court.

17 So we have not agreed that means the case will  
18 re-commence at that point. But we do agree that this stay  
19 will go through this group of ten reexaminations, and at  
20 that point the Court would call a status conference and the  
21 parties would then have their opportunity to suggest to the  
22 Court how the case should proceed at that point. And all  
23 parties, plaintiffs and all the defendants, are reserving  
24 their rights at that time to take whatever position is  
25 appropriate at that point in time.

1 THE COURT: Thank you, Mr. Doyle.

2 Mr. Benz, do you disagree with that approach?

3 MR. Benz: No, Your Honor, we do not. That is  
4 the approach that we agree with. As we pointed out in our  
5 response motion that was also filed yesterday, we had been  
6 having discussions with Kyocera, and Kyocera joined us in  
7 the proposed order that we put together. As Mr. Doyle  
8 pointed out, the proposed order that was presented by  
9 plaintiff does exactly what he just laid out.

10 THE COURT: Okay. My apologies.

11 So who is it among the defendants who wants to  
12 speak that disagrees with the approach outlined right now by  
13 Mr. Doyle?

14 MR. LEVINE: Your Honor, we disagree with the  
15 approach because we believe that it's premature. When  
16 looking at whether or not to stay a case pending reexam, one  
17 of the factors that the Court looks at is whether a stay  
18 will simplify the issues in the case. At this point in time  
19 in this particular case, we don't yet know if the claims  
20 that are subject to reexam are going to be rejected by the  
21 Patent and Trademark Office. There have been no office  
22 actions that have issued yet. And if so, Mr. Benz will  
23 amend those claims --

24 THE COURT: Mr. Levine, I may interrupt from  
25 time to time.

1                   Is that the point in time at which the Court  
2 typically addresses the issue, that is, once there have been  
3 office actions and the like?

4                   MR. LEVINE: There is no definitive rule or  
5 point in time.

6                   THE COURT: I would agree with you on that. Go  
7 ahead.

8                   MR. LEVINE: I believe that when courts look at  
9 the issue, that they are looking at the issue to say, Do I  
10 have enough today to determine whether or not a stay would  
11 simplify the issues. Certainly, when there has been an  
12 office action and a claim amendment, and the parties have  
13 had their meet-and-confers over what the claim terms are  
14 that are in dispute and what those proposed terms mean, we  
15 are all in a much better position to say, hey, you know  
16 what? This particular case with these particular disputes  
17 and amendments and office actions would be a case that would  
18 be in a position where a stay would simplify.

19                   But we don't know that.

20                   THE COURT: Aren't we often in that situation  
21 you described a good distance down the discovery road and  
22 thus well into litigation budgets by that time?

23                   MR. LEVINE: Not necessarily. In the schedule  
24 that we have in this case, the parties are to exchange claim  
25 terms on December 17th. We are to exchange proposed

1 constructions on January 21st, then to meet and confer on  
2 February 11th, and submit the joint claim construction chart  
3 on February 18.

4 Our suggestion is on February 18th, when we  
5 supply the Court with the joint claim construction  
6 statement, that at that time we also supply the Court with  
7 two-page letters, saying whether we think at that time it is  
8 appropriate, given what water has gone over the dam by then,  
9 really only two and a half months from now, I think we will  
10 be in a much better position to know whether the case would  
11 be simplified as a result of the stay.

12 THE COURT: Let me ask you this question. It  
13 has to do with delay.

14 Let's assume we accept that approach. When  
15 would you anticipate the Court addressing those two-page  
16 letters and reconvening this conference and making a  
17 decision? How quickly, optimally, would you envision that  
18 happening?

19 MR. LEVINE: Our suggestion is that we would  
20 have a teleconference with the Court during the week of  
21 February 22nd.

22 THE COURT: It's not possible. I can't  
23 accommodate you on my schedule. I can tell you that off the  
24 top of my head.

25 MR. LEVINE: The reason we suggested that was to

1 try and time it to occur before the first claim construction  
2 brief went in.

3 THE COURT: Only if it could be done that way, I  
4 might agree with you, Mr. Levine. But I, as you might  
5 know -- and you have been in front of this Court before, you  
6 have litigated frequently in Delaware -- and I am sure you  
7 are aware of the fact that we have had a vacancy extant for  
8 now going on three years. And given that fact and the  
9 consequent press of business on this Court, our dockets, all  
10 three of us are completely packed, not only with complex  
11 civil matters, but perhaps more importantly with criminal  
12 matters that now three judges are doing the work of four in  
13 the criminal arena, where we have constitutional  
14 prescriptions that we must follow and statutory, with regard  
15 to things like, small little things like speedy trial.

16 That is why I ask the question. I don't mean to  
17 be unduly facetious.

18 Counsel, you sort have got to open your eyes as  
19 to the reality of the Court's docket.

20 Go ahead, Mr. Levine.

21 MR. LEVINE: Your Honor, we certainly are  
22 cognizant of that. And that was one of the reasons for  
23 structuring our proposal in a way that the parties, all of  
24 us on the phone today, would be working in December,  
25 January, and February to see how we could simplify and

1 tailor this case, and then come back to Your Honor before  
2 there would be anything on the document that would  
3 necessitate the Court's involvement, such as reading through  
4 the claim construction briefs and preparing for a Markman  
5 hearing.

6 So that is why we suggested the procedure that  
7 we did, so as to allow us to really crystallize what's in  
8 dispute between all of us, what is the date of conception  
9 and reduction to practice.

10 THE COURT: I understand your position, Mr.  
11 Levine.

12 Does anyone else want to weigh in on this, with  
13 something new?

14 MR. DAY: Yes, Your Honor. This is John Day.  
15 If I may speak on behalf of the phone carrier defendants.

16 THE COURT: Go ahead.

17 MR. DAY: We are on somewhat different footing  
18 than most of the other defendants in the case.

19 Your Honor may recall that from the beginning of  
20 the case the position of the cell phone carriers has been  
21 that this really isn't our fight, that FlashPoint's case is  
22 really against the manufacturers of the handsets and that we  
23 are really simply customers of those handset manufacturers,  
24 who are the real parties in interest with respect to  
25 FlashPoint's infringement case.

1           Your Honor may also recall that at the  
2           scheduling conference, the Court graciously gave us an  
3           opportunity to address that point with FlashPoint, and went  
4           back to chambers and allowed us to discuss and try to reach  
5           a mutual accommodation of a way to get the cell phone  
6           carrier defendants out of the case promptly. And we were  
7           able to reach that agreement, and Your Honor incorporated it  
8           into the scheduling order in this case.

9           So from the perspective of the cell phone  
10          carrier defendants, Your Honor, our only problem with the  
11          stay is that it is going to keep us in the case when we had  
12          reached an agreement with FlashPoint to get us out of the  
13          case promptly.

14          We have carried out our end of the bargain. We  
15          agreed on or before June 30th to identify for FlashPoint all  
16          of the manufacturers or suppliers of our handsets. All of  
17          the cell phone carriers have done that. A couple of the  
18          carriers went beyond what they were required to do and even  
19          provided FlashPoint with contact information for the lawyers  
20          for those manufacturers to facilitate getting them in the  
21          case and getting us out of the case.

22          And the order contemplated that FlashPoint would  
23          use its best efforts to add those manufacturers into the  
24          case and then dismiss us.

25          We just want to be out of the case, frankly,



1 Your Honor. We have complied with our end of the bargain.  
2 We are concerned that FlashPoint hasn't taken reasonable  
3 efforts to join any of those handset manufacturers who we  
4 identified and provided contact information for. None of  
5 them have yet been added to the case.

6 We find ourselves in the position of potentially  
7 now getting stayed and remaining in the case beyond the time  
8 to which we agreed.

9 On behalf of the cell phone carriers, we would  
10 suggest that while we aren't opposed to a stay, we are  
11 opposed to a stay that includes us. Perhaps a fair and  
12 simple way to resolve that issue would be for FlashPoint to  
13 do what they agreed they would do after they added the  
14 parties we identified. That is, dismiss us without  
15 prejudice.

16 THE COURT: Thank you, Mr. Day.

17 MR. DAY: So we won't be estopped.

18 THE COURT: Mr. Benz, would you please respond,  
19 not yet to Mr. Levine's points, but Mr. Day's.

20 MR. Benz: Your Honor, I will respectfully yield  
21 to my colleague, Mr. Ward.

22 MR. WARD: Good afternoon, Your Honor.

23 We actually don't have any serious problems with  
24 the carriers. They have been forthcoming. They have given  
25 us names of their manufacturers. Unfortunately, right now,

1 I don't think they would be particularly prejudiced by the  
2 stay. If it gets lifted and we have claims that we can  
3 assert, then we would replace them with the manufacturers.  
4 But, Your Honor, right now we are in a difficult position,  
5 because as much as we would like to file an amended  
6 complaint naming the manufacturers and getting them involved  
7 in the case, right now the claims that we would assert are  
8 the subject of reexamination, so we have a pleading problem.

9 THE COURT: What can be done creatively to  
10 address Mr. Day's concerns as soon as possible, after  
11 reexam, assuming I would grant the stay?

12 MR. WARD: After reexam, Your Honor, assuming we  
13 have claims that come back out that we can assert, we would  
14 substitute in the manufacturers that the carriers have  
15 identified and be willing to dismiss without prejudice all  
16 the carriers. We are in that position, Your Honor. But I  
17 am not in a position where we can file that amended  
18 complaint and meet our pleading requirements.

19 THE COURT: Mr. Day, Mr. Ward seems to have a  
20 reasonable problem there and remains, however, willing to  
21 abide by the commitments he made earlier. Why don't you  
22 react.

23 MR. DAY: I must respectfully disagree with Mr.  
24 Ward. I don't understand the problem. They agreed to  
25 dismiss us without prejudice. And I don't see any harm to

1       them in living up to that agreement rather than holding us  
2       in the case longer than what was agreed to.

3               We are talking about a handful of manufacturers  
4       who need to be added, less than five. It will be easy for  
5       them to add them. If there is some problem down along the  
6       line, the dismissal will be without prejudice, and they  
7       perhaps could try to add us back into the case.

8               We in good faith bargained to get out of the  
9       case early. They agreed to it.

10              This is not the first time they have tried to  
11       get out of that agreement. Your Honor may also recall that  
12       when they submitted the proposed scheduling order, they  
13       tried to extend the stay that they agreed to and sort of  
14       wriggled out of it. Your Honor quite rightly tried to get  
15       them to cooperate directly with the scheduling that was in  
16       order.

17              I don't see a problem with a dismissal without  
18       prejudice.

19              THE COURT: I understand your point. Let me ask  
20       you this: Would the carrier defendants be, assuming a stay  
21       and a dismissal without prejudice, would the carrier  
22       defendants be willing to come back in should it be  
23       determined by the plaintiff, by FlashPoint, that for some  
24       reason, good-faith reason were necessary, that you would  
25       come back in without a fight?

1 MR. DAY: That is a difficult question to answer  
2 without talking to my client, Your Honor. Perhaps some of  
3 the lead counsel for the cell phone carriers may have  
4 already had that discussion. But I have not.

5 THE COURT: Anybody prepared to answer that  
6 question?

7 (No response.)

8 THE COURT: It's mighty quiet out there today.

9 MR. WARD: Your Honor, speaking on behalf of  
10 FlashPoint, that is a separate issue. We would be happy to  
11 pursue that with the carriers and see what creative  
12 solutions we could come up with.

13 THE COURT: Mr. Ward, I am somewhat inclined to  
14 Mr. Day's point of view. You have got an agreement: They  
15 get dismissed without prejudice. I understood your earlier  
16 point, but I am not quite sure why you are not willing to  
17 abide by the deal that was made.

18 MR. WARD: I think we have always had some level  
19 of disagreement as to what the actual agreement that we came  
20 to was. Our position would be that we certainly agreed that  
21 if we had manufacturers in the case standing in the shoes of  
22 carriers, then we would be willing to dismiss the carriers.  
23 But until that happens, then the carriers are still  
24 responsible for infringing sales, Your Honor. And we are  
25 disinclined to dismiss them and try to get them back in

1 later. It is certainly easier to keep them in as opposed to  
2 bringing them back later.

3 MR. DAY: Your Honor, may I respond to that?

4 THE COURT: Yes, may.

5 MR. DAY: Mr. Ward may think there is some  
6 misunderstanding about what was agreed to. But it's stated  
7 pretty clearly in the Court's scheduling order. And the  
8 language from the scheduling order required us on or before  
9 June 30th to identify the manufacturer or supplier of cell  
10 phones that are sold with a camera. We did that.

11 Discovery was then to be stayed to allow them  
12 time to bring -- identify unlicensed manufacturers or  
13 suppliers into the case. And then the scheduling order says  
14 on or before May 20th, 2010, which was the period of time  
15 that that stay against the carrier defendants, discovery  
16 against the carrier defendants was entered on that  
17 scheduling order, On or about May 20 plaintiff shall dismiss  
18 its claims without prejudice against each carrier defendant  
19 and non-manufacturing defendant unless and only to the  
20 extent it was unable through reasonable efforts to add the  
21 manufacturers or suppliers of accused camera phones or  
22 cameras for any such defendant.

23 We gave them the identities of those  
24 manufacturers almost five months ago. As far as we can  
25 tell, they have done nothing to add those manufacturers to

1 the case. We gave them the phone numbers for some of those  
2 manufacturers, who have not heard from FlashPoint in five  
3 months.

4 So I think it's pretty clear that there haven't  
5 been any reasonable efforts to add them, and that under this  
6 circumstance, the scheduling order requires them to dismiss  
7 us.

8 MR. WARD: Your Honor, I don't know what the  
9 Court could possibly do with that (inaudible) pretty far  
10 offer.

11 We have taken steps. We have an amended  
12 complaint ready to go. As I previously explained, we are  
13 not in a position to file that now given the request for  
14 reexamination.

15 The carriers aren't going to be prejudiced in  
16 any way just standing on the sidelines if the Court should  
17 grant a stay, and once the stay is lifted, we can file the  
18 amended complaints, if the manufacturers come in.

19 And certainly the language that Mr. Day just  
20 read clearly provides that they are getting out if and only  
21 if the manufacturers are able to be added to the case.  
22 Until that happens, Your Honor, certainly the stay is going  
23 to provide that the carriers aren't prejudiced in any way.  
24 If and when the Patent Office reissues these patents, we  
25 will be in a position to file the amended complaint and soon

1       thereafter we will let the carriers go.

2               THE COURT: Mr. Day, what is -- I can imagine  
3       what you might say -- but what is the prejudice that would  
4       be suffered by the carrier defendants, again, assuming that  
5       the stay were granted, that you would suffer?

6               MR. DAY: I can tell you, Your Honor, that -- a  
7       couple of things. One is that although discovery against  
8       the carrier defendants has been stayed since June 30th, when  
9       we identified the cell phone manufacturers, this litigation  
10      has still cost each of the cell phone carrier defendants,  
11      because their lawyers have had to monitor what's been going  
12      on in the case even though it has been stayed against us for  
13      a number of months at a not inconsiderable expense.

14              I expect that that would be true to some extent  
15      for the remainder of the stay. Instead of being out of the  
16      case promptly, which is again what both parties agreed to,  
17      we would be in the case even though stayed, spending money,  
18      monitoring what's going on, keeping up with the e-mail  
19      traffic and everything else.

20              Secondly, with respect to prejudice, the  
21      prejudice is that we are being denied the benefit of our  
22      bargain that we reached through good-faith negotiations,  
23      which was a prompt dismissal.

24              THE COURT: Mr. Day, let me get you to address  
25      Mr. Ward's point that you're really not being denied the

1 benefit of the bargain because the date -- I think it's May.

2 MR. DAY: That is true. We are not yet to May.

3 But the stay now being looked at conceivably could go on for  
4 a couple of years. We could be in this case for a long  
5 time.

6 THE COURT: I have not kept up with how long  
7 reexams are taking of late. I did have a handle on that at  
8 one point, but I don't any longer.

9 UNIDENTIFIED SPEAKER: I daresay I certainly  
10 think, Your Honor, it's fair to say, we wouldn't be out by  
11 May.

12 THE COURT: Why couldn't we revisit this issue  
13 specifically in that respect for the plaintiff and carrier  
14 defendants in May?

15 MR. DAY: The carrier defendants would be  
16 willing to do that, Your Honor.

17 THE COURT: How about FlashPoint?

18 MR. WARD: We are willing to do that, Your  
19 Honor.

20 THE COURT: I am going to ask that you come up  
21 with some language, unless I am persuaded not to stay.

22 Mr. Benz, I think it is you who needs to  
23 responds to Mr. Levine's points.

24 MR. Benz: Yes, Your Honor.

25 Quite frankly, I disagree with Mr. Levine's



1 point that the appropriate time is not now before we engage  
2 in a significant amount of additional discovery.

3 The point of staying pending reexams is judicial  
4 economy and simplification of the case, and the recognition  
5 that during the reexam process, statistics show that a  
6 number of claims get canceled, a number of claims get  
7 modified and some claims make it straight through.

8 With that being the backdrop, it seems  
9 inefficient to continue with discovery where we are going to  
10 come up with a list of claim terms, some of which terms may  
11 not be in the claims anymore if they get modified during the  
12 reexamination process.

13 So everything I have seen -- and I haven't seen  
14 anybody present any case law to the contrary -- all the case  
15 law that I have seen and decisions coming out of courts,  
16 again, the earlier the stay is granted, the more beneficial  
17 it is in the interests of judicial economy and litigation  
18 costs on the part of the parties. The benefits just greatly  
19 outweigh any sort of continued litigation expense, both for  
20 the Court and for the parties.

21 THE COURT: I agree with your point of view, Mr.  
22 Benz, and disagree decidedly with Mr. Levine's stated  
23 position, respectfully, and agree with you as well. I have  
24 addressed this issue of stay many times, as I think probably  
25 you all know, and have come out on both sides. Though I am,

1 perhaps reliably, reported as having granted more stays than  
2 most trial judges do, than a lot of us do in the country. I  
3 don't think that is still accurate, because of late I have  
4 denied a number.

5 In any event, regardless of that, my inclination  
6 and my ruling is to accede to the relief requested by the  
7 plaintiff and agreed to at least by certain of the  
8 defendants, to the specific proposal that has been outlined  
9 and agreed to by Kyocera and FlashPoint and Aiptek and HTC.

10 MR. BRADLEY: Your Honor, for LG Electronics.

11 May I raise a new point?

12 THE COURT: No, not until I am finished talking.

13 Mr. Benz, I am going to ask that your prepare a  
14 new order that also accounts for Mr. Day's concerns.

15 Obviously, Mr. Day, you will participate in the  
16 preparation of that order. That will require us to revisit  
17 the continued involvement of the carrier defendants in light  
18 of the agreement that is reflected in the scheduling order.  
19 Okay?

20 MR. DAY: I understand, Your Honor.

21 MR. BRADLEY: Your Honor, this is Jim Bradley on  
22 behalf of LG Electronics.

23 Your Honor, we may not oppose a stay. We  
24 believe it is premature from the standpoint that FlashPoint  
25 has not yet identified for us the basis for its infringement

1 contentions. Back in August we served a very basic set of  
2 interrogatories asking for their contentions, seeking --

3 THE COURT: When was that filed, counsel?

4 MR. BRADLEY: That was served on August the  
5 21st. And the response was objections by FlashPoint that we  
6 would get this in the November 19th submission of their  
7 asserted claims and accused products.

8 We just got that this morning. I have seen it  
9 only a few hours ago.

10 What our interrogatories suggest and what we  
11 think we are entitled to, particularly if there is going to  
12 be some extended delay in this case, is, in addition to  
13 providing the basis for their infringement allegations, that  
14 they provide us with the requested charts showing how the  
15 claims relate to the accused products and whether or not the  
16 contentions are that we directly infringe or indirectly  
17 infringe and what entities use, or, as we asked, to carry  
18 out the method steps. Is it the user who operates the  
19 camera? Is it the programmer who develops the software? Or  
20 is it the manufacturer?

21 Our position is that it is premature, and we  
22 don't have any basic answers to basic questions as to why  
23 FlashPoint believes we infringe. If we got those answers,  
24 we would not oppose a stay.

25 MR. Benz: Your Honor, again, the argument is

1 the same as Mr. Levine's. At this point, with 141 claims  
2 being in reexamination, we don't know how those claims are  
3 going to come out. As premature as he thinks the stay is,  
4 it's premature to put together a list of infringement  
5 contentions when you don't know how those particular claims  
6 are going to come out when they come out of reexamination.

7 Therefore, the purpose of the stay is to allow  
8 the administrative process to run its course, to either  
9 issue the claims as they are now, to cancel claims, to  
10 modify claims, and at that point we will have a clearer  
11 picture of exactly how the claims read and how those claims  
12 read onto the infringing products.

13 THE COURT: Has any other defendant interposed  
14 similar requests to which you have responded?

15 MR. Benz: Your Honor, we received basically the  
16 same request from most of the defendants for infringement  
17 contentions. Our objections were at the time --

18 THE COURT: I meant other than by objection. I  
19 should have been more precise. Other than by objection.

20 MR. Benz: I am not sure I understand your  
21 question.

22 THE COURT: Mr. Bradley has asked what he has  
23 asked for, the basis of the infringement allegations, the  
24 requested claim charts, what entities infringe. Have you  
25 responded to similar interrogatories substantively?

1 MR. Benz: Negative, Your Honor.

2 THE COURT: Mr. Bradley, why don't you react to  
3 Mr. Benz's point concerning the reason for a request for a  
4 stay at this point.

5 MR. BRADLEY: Thank you, Your Honor.

6 Yes, FlashPoint knows and has identified  
7 particular claims that they allege infringe certain  
8 products, so they must have known at the time they filed the  
9 complaint and certainly now they have a basis for reading  
10 those claims on the accused products and showing us on an  
11 element-by-element basis.

12 THE COURT: I got you. I agree with that.

13 Let me interrupt for just a second. Isn't it  
14 more likely that the issues will be better focused and the  
15 ability of the plaintiff to respond and not to have to amend  
16 responses would occur, be extant, after reexam than today?

17 MR. BRADLEY: We don't think necessarily so in  
18 that we are looking for FlashPoint's present contentions.  
19 FlashPoint has pointed out that the statistics indicate it  
20 could be two or three years, where they are going to be  
21 designing manufactured products, without an ability to know  
22 of what FlashPoint's allegations are against us. How do  
23 they think we infringe? What is their work product?

24 They ought to be able to provide it to us to  
25 identify the contentions. In fact, in the proposed order

1 submitted by FlashPoint, they did want mediation to continue  
2 to occur. I don't know how we could sit down without an  
3 understanding of their infringement contentions, based on  
4 claim terms. If the claim terms change in the future,  
5 perhaps. But at this point in time, when things may be  
6 frozen for the next couple of years, our client needs to  
7 know.

8 MR. CHASSMAN: Your Honor, Pete Chassman for  
9 Research in Motion.

10 We have the same concern and it is likely that  
11 the unamended terms, their contentions would be not a good  
12 place to start --

13 THE COURT: What you are talking about is the  
14 commercial realities out there.

15 Mr. Benz, it doesn't seem to me to be an  
16 unreasonable request, given someone who is alleging  
17 infringement's responsibility to conduct a reasonable  
18 investigation and understanding its infringement position  
19 prior to filing the complaint.

20 MR. Benz: I agree with that, Your Honor. Our  
21 prefiling investigation, obviously, as you know, is work  
22 product and it would only come into play if someone would  
23 raise a legitimate and substantial Rule 11 --

24 THE COURT: Here is the thing: It is going to  
25 come to pass that at some point you are going to respond to

1 those requests. I don't understand the harm in doing that  
2 now. You may have to amend them at a certain time. I don't  
3 see the harm to that, and I can see the benefit,  
4 particularly from a commercial point of view, as to the  
5 defendants raising this issue -- and I suspect this is all  
6 of them -- of their compliance, of trying to function in a  
7 marketplace given this thin lining over them, trying to  
8 design products and at least given some pretty  
9 straightforward accusations, your clients' accusations of  
10 infringement.

11 What is the prejudice to that? Don't tell me  
12 about judicial economy. Go ahead.

13 MR. Benz: Your Honor, I understand. Again, the  
14 point is that, again, we look at the statistics as much as  
15 everyone else does and understand that a number of our  
16 claims will have to be amended. And therefore, to at this  
17 point put out some sort of contentions when we don't even  
18 know what the language of the claims are going to be when we  
19 go forward I believe is prejudicial to us.

20 By the same token, as strongly as we disagree  
21 with the fact that we should have to produce infringement  
22 contentions, our interrogatories were actually served a  
23 month before defendants', and we asked for their invalidity  
24 contentions, and we do not have those to date.

25 At this point, it seems, if the Court is

1 inclined to stay the case, the case should be stayed and we  
2 should not produce infringement contentions. They should  
3 not produce invalidity contentions. We should let the  
4 administrative process work through its course and pick it  
5 up when the patents are reexamined.

6 THE COURT: Mr. Bradley.

7 MR. BRADLEY: That does not concern the  
8 commercial risk of not knowing of the patentee's position as  
9 to how they think we infringe. They talk about the  
10 invalidity contentions. I think they are fairly well set  
11 forth in the reexamination petitions, where the prior art  
12 has been cited to them. Additional art may be discovered to  
13 go forward. Looking at statistics and reexamination, as we  
14 note I think in our paper, something like 59 percent of the  
15 cases -- there is one independent claim that is confirmed.

16 We are at a risk for the next two or three  
17 years. Suit was filed in 2008, March. We are asking now  
18 for an identification of their theory of infringement. We  
19 are interested to be informed at some point. We think we  
20 are entitled to it now. There are millions and millions of  
21 dollars worth of product at stake, and FlashPoint keeps us  
22 in the dark.

23 THE COURT: I am going to rule that the stay  
24 should be granted with the previous conditions discussed and  
25 that counsel provide in the order, the stipulated order, the



1 additional requirement that they respond to the contention  
2 interrogatories outlined by Mr. Bradley and other defendants  
3 of a similar nature, and that, Mr. Bradley, your client and  
4 other defendants to whom FlashPoint has interposed such  
5 requests regarding your invalidity positions, that you  
6 respond to those in more than just the fashion you have  
7 outlined. That is, that you actually formally respond.

8 MR. BRADLEY: Yes, Your Honor.

9 THE COURT: The order should reflect those two  
10 things in addition to the need to come back at the behest of  
11 the parties after the patents come out of reexam or however  
12 you couched it, along with the May issue raised by Mr. Day.

13 Any questions about that?

14 MR. Benz: Your Honor, when would you like to  
15 see that order?

16 THE COURT: I think it will require some further  
17 discussion by counsel. How long do you think you will need?

18 I hope that I have made my intentions clear. I  
19 don't want there to be a debate. Is there any  
20 misunderstanding as to what I intend?

21 MR. Benz: No, Your Honor, I don't believe so.

22 THE COURT: The other side agrees?

23 MR. BRADLEY: Yes, Your Honor.

24 UNIDENTIFIED SPEAKER: Yes, Your Honor.

25 THE COURT: How long do you think it will take

1       you to get a stipulated order together? A week?

2               MR. Benz: That is acceptable, Your Honor.

3               THE COURT: Other side?

4               UNIDENTIFIED SPEAKER: When we say week, I  
5       wanted to remind everybody that next week is Thanksgiving.

6               THE COURT: Let's say two weeks. December 4.

7               UNIDENTIFIED SPEAKER: Thank you, Your Honor.

8               MR. Benz: Thank you, Your Honor.

9               THE COURT: You are welcome. Take care. Have a  
10      good Thanksgiving.

11               (Conference concluded at 3:22 p.m.)

12                               - - -

13      Reporter: Kevin Maurer

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